defense, the district court must examine whether the habeas petitioner will be prejudiced by the delay in raising the issue. See *id.* at 30a-31a.

Applying these principles to petitioner's case, the court held that the district court had the power to flag the potential statute of limitations issue *sua sponte*, even if the government's actions constituted waiver;[6] that the district court had provided petitioner with sufficient notice of, and a sufficient opportunity to respond to, the district court's raising of the timeliness issue; that the district court's raising of the issue was not so late that petitioner was prejudiced; and that the government's delay in raising the issue had not been in bad faith. See Pet. App. 31a-34a. Accordingly, the court affirmed the district court's dismissal of petitioner's Section 2255 motion as untimely. See *id.* at 34a.

b. Judge Nygaard filed an opinion dissenting in relevant part, see Pet. App. 36a-53a, and Judge Sloviter filed a dissenting opinion. See *id.* at 54a-55a. The other dissenting judges joined both dissents. See *id.* at 36a, 54a. Judge Nygaard would have remanded the case for an evidentiary hearing on equitable tolling, see *id.* at 36a-39a, and believed that the government had waived the statute of limitations issue by failing to raise it in its response to the Section 2255 motion. See *id.* at 39a-47a. In Judge Nygaard's view, the majority's decision rendered the concept of waiver a nullity and

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[6] Although during oral argument before the three-judge panel, the United States acknowledged that it had waived the statute of limitations within the meaning of the Third Circuit's decision in *Robinson*, see Pet. App. 48a n.26 (Nygaard, J., dissenting), the United States argued to the en banc court that it had not waived the statute of limitations in light of the Third Circuit's subsequent interpretation of *Robinson* in *Long*. See Gov't C.A. Supp. Br. 4 & n.1.

impermissibly permitted the district court to act as *de facto* government counsel. See *id.* at 48a-52a. Judge Sloviter contended that the majority's reliance on the Third Circuit's decision in *Long*, which permitted a respondent to adopt a magistrate's *sua sponte* raising of the limitations issue as a constructive amendment to its answer, eviscerated the Third Circuit's holding in *Robinson*, which required that the statute of limitations defense be asserted in a timely manner. See *id.* at 54a-55a.

ARGUMENT

1. Petitioner contends (Pet. 8-19) that the Third Circuit's decision conflicts with that of other courts of appeals on the question whether, in habeas cases, a district court may *sua sponte* raise the statute of limitations where the respondent has answered the petition without asserting that the petition is untimely. The decision below is correct, and this case is not a suitable vehicle for resolving the tension in the courts of appeals identified by petitioner. The petition should be denied.

a. The court of appeals' decision is correct, whether viewed through the prism of the special rules that apply to Section 2255 proceedings or the rules that apply to ordinary civil cases.

i. The Rules Governing Section 2255 Proceedings (Section 2255 Rules) expressly authorize a district court to consider, on its own initiative, whether grounds exist for dismissal of a Section 2255 motion. The current version of Rule 4(b) provides that "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion."

Section 2255 Rules, Rule 4(b);[7] see 28 U.S.C. 2255 (permitting courts to dispose of a Section 2255 motion without "caus[ing] notice thereof to be served upon the United States attorney" and without "grant[ing] a prompt hearing" if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"). Rule 4 thus clearly contemplates summary dismissal of a Section 2255 motion by a district court on any fatal ground, even if the ground is one that, in an ordinary civil case, generally must be asserted by the opposing party.

In light of this rule, and the similarly-worded rule that applies to federal collateral challenges of state convictions under 28 U.S.C. 2254, every court of appeals to consider the issue has held that a district court has the authority to raise *sua sponte* AEDPA's statute of limitations, at least before a response to the habeas petition is filed. See, *e.g.*, *Jackson* v. *Secretary for Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002) (per curiam) (Section 2254 case); *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002) (same); *Herbst* v. *Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001) (same); *Acosta* v. *Artuz*, 221 F.3d 117, 122-124 (2d Cir. 2000) (same); *Kiser* v. *Johnson*, 163 F.3d 326, 328-329 (5th Cir. 1999) (same); see also *United States* v. *Sosa*, 364 F.3d 507, 513 (4th Cir. 2004) (applying *Hill* in Section 2255 case). These courts reason that the rule "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser*, 163 F.3d

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[7] Before the amendments that became effective on December 1, 2004, this portion of Rule 4 provided: "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal."

at 328; see, *e.g.*, *Acosta*, 221 F.3d at 123 (*sua sponte* dismissal for failure to comply with the AEDPA limitations period "is consistent with the authority provided to the district courts in 2254 Habeas Rule 4 and 2255 Habeas Rule 4(b)").

As these cases have recognized, the statute of limitations in AEDPA "implicates values beyond the interests of the parties." See, *e.g.*, *Acosta*, 221 F.3d at 121 (citing cases). Collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). "Congress enacted AEDPA to advance the finality of criminal convictions. * * * To that end, it adopted a tight time line, a one-year statute of limitation period." *Mayle* v. *Felix*, 125 S. Ct. 2562, 2573 (2005). In adopting that one-year limitation for Section 2255 motions, Congress "clearly intended to limit collateral attacks upon judgments obtained in federal criminal cases." *United States* v. *Thomas*, 221 F.3d 430, 434 (3d Cir. 2000). Indeed, such a limitation is "the very *raison d'etre* of the AEDPA." *Ibid.* As the court of appeals here recognized, that limitation furthers finality, preserves judicial resources, curbs the abuse of the writ of habeas corpus, and promotes the public reputation of judicial proceedings and the public interest generally. Pet. App. 25a; see *id.* 17a-20a, 28a-29a.

As the court below held, these same considerations compel the conclusion that a district court retains the power to raise *sua sponte* AEDPA's statute of limitations, even though the United States files a responsive pleading failing to do so. Pet. App. 28a-31a, 34a-35a. As an initial matter, nothing in the text of Rule 4 limits the district court's power to dismiss motions when "it plainly appears * * * that the moving party is not entitled to

relief" to the time period before the United States files a response. Section 2255 Rules, Rule 4. Indeed, a district court with subject matter jurisdiction always has authority to apply the governing law. Section 2255 expressly empowers district courts to "determine the issues and make findings of fact and conclusions of law." 28 U.S.C. 2255. And the public interests animating AEDPA's statute of limitations are no less important after the court calls for a response than they are before it does so.

As the court below observed, courts have recognized comparable authority in similar circumstances. See, *e.g.*, Pet. App. 21a-22a & n.14. In *Granberry* v. *Greer*, 481 U.S. 129, 134 (1987), this Court held that a court of appeals had the power to dismiss a habeas petition for the failure to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. This Court concluded that "[t]he appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it, and the court is not obligated to regard the State's omission as an absolute waiver of the claim." *Id.* at 133. Rather, an appellate court should consider the interests of comity, federalism, and judicial efficiency, *id.* at 135, and decide "whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition forthwith." *Id.* at 131. As the Third Circuit observed in *Long*, after *Granberry*, "[i]t is now widely recognized that judges have discretion to raise procedural issues in habeas cases." 393 F.3d at 403. Indeed, at least eleven circuits have extended *Granberry*'s reasoning to procedural default, concluding that habeas courts may raise *sua sponte* that affirmative defense, even if the respondent fails to do so. See, *e.g.*,

Yeatts v. *Angelone*, 166 F.3d 255, 261-262 (4th Cir.) (collecting cases from the First, Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits)), cert. denied, 526 U.S. 1095 (1999); *Lorraine* v. *Coyle*, 291 F.3d 416, 425-426 (6th Cir. 2002); *King* v. *Kemna*, 266 F.3d 816, 822 (8th Cir. 2001) (en banc); see *Trest* v. *Cain*, 522 U.S. 87, 90 (1997) (reserving the issue).

AEDPA's statute of limitations advances concerns no less important than those advanced by the doctrines of exhaustion and procedural default. Although the interests of comity and federalism do not apply in the context of Section 2255 motions, the public interests in the finality of judgments and in judicial economy plainly do. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982).

ii. Even putting aside the special concerns raised by the fact that this is a collateral challenge to a final judgment, the decision below is consistent with the rules of procedure governing ordinary civil cases. Those rules may be applied in Section 2255 proceedings to the extent that they are not inconsistent with statutory provisions or the Section 2255 rules. See Section 2255 Rules, Rule 12; Fed. R. Civ. P. 81(a)(2); *Mayle*, 125 S. Ct. at 2569. Although, in ordinary civil cases, affirmative defenses generally must be raised in a first responsive pleading, "a defense may be raised in a number of ways even if the defense is not presented in the initial response." 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005).

For example, under Rule 15(a) of the Federal Rules of Civil Procedure, leave of court to amend an answer "should be freely given when justice so requires." See 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278, at 684-685 (3d ed. 2004)

(noting that "Rule 15(b) does give the trial court discretion, which a number have exercised, to permit the amendment of the pleadings over objection when doing so will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to defend against the substance of the issue"). In addition, affirmative defenses may be raised for the first time by a defendant in a post-answer dispositive motion or by the district court *sua sponte* when resolving such a motion. See Moore, *supra*, at 8-36 to 8-40. Accordingly, allowing the United States here to rely post-answer upon the statute of limitations, where petitioner suffered no prejudice as a result, fully accords with the rules of ordinary civil practice. See, *e.g.*, *Long*, 393 F.3d at 399-401.

iii. Petitioner's principal argument on the merits in this Court is that the decision below is unfair, as it places the district court in the role of advocate. Pet. 16-19. That contention is unfounded. The decision below merely recognizes that the district court has the authority to call to the attention of the parties a question as to whether, under the governing law, the statute of limitations has run and to request the parties' views on that issue. Far from being improper, that course represents sound case management on the part of the district court.

b. In any event, this is not a suitable vehicle to review the purported conflict asserted by petitioner for several independent reasons.

i. Because petitioner did not object in the district court to the court's *sua sponte* raising of the statute of limitations issue, nor did he contend that the United States waived the issue by failing to raise it in its

answer, see C.A. App. 95a-99a; C.A. Supp. App. SA3-SA7, a threshold issue exists as to the standard of review that should be applied to the first question presented in his certiorari petition. Furthermore, if the appropriate standard is plain-error review, a definitive interpretation of the power of district courts, post-answer, to raise *sua sponte* a potential issue about Section 2255's statute of limitations would not be necessary to resolve this case.

The United States argued in the court of appeals that, as a result of petitioner's failure to object in the district court, he was entitled only to plain-error review. See Gov't C.A. Br. 5-6; Gov't Supp. Br. 4. Although the court of appeals stated that its review was "plenary," Pet. App. 11a, it provided no rationale for its failure to apply the plain-error standard. Cf. *Johnson* v. *United States*, 520 U.S. 461, 466 (1997) (noting that courts have no authority to create exceptions to plain-error standard of Fed. R. Crim. P. 52(b)).

Although this Court has not squarely decided the issue, it has suggested that an unpreserved claim of error in a Section 2255 proceeding is subject, at most, to plain-error review. See *Frady*, 456 U.S. at 167 n.15 ("A court of appeals * * * could invoke the 'plain error' standard on direct review of a district court's conduct of a § 2255 hearing, if the court of appeals found a sufficiently egregious error in the § 2255 proceeding itself that had not been brought to the attention of the district court."); see also Section 2255 Rules, Rule 12 (providing that either the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure may be applied to Section 2255 proceedings, when not inconsistent with

any statutory provision or the Section 2255 rules).[8] To prevail in this Court under a plain-error standard of review, petitioner would have to establish that any error by the district court was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Given the authority discussed above, see pp. 8-15, *supra*, petitioner cannot (and does not attempt to) make that showing.

ii. The conflict alleged by petitioner is not directly implicated by this case. Petitioner points to only two published court of appeals decisions that it claims are in conflict with the decision below. See Pet. 10-13 (citing *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004)). As an initial matter, both of those decisions interpret a district court's *sua sponte* powers in the context of Section 2254 petitions challenging state court convictions. Indeed, with the sole exception of this case, the published court of appeals decisions squarely addressing the question presented have arisen in the context of Section 2254 proceedings, rather than in Section 2255 proceedings.[9] Although the issues are related, and the proper conclusion in each context may well be the same (as the court below concluded, Pet.

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[8] Cf. Fed. R. Civ. P. 46 (requiring party to "make[] known to the court * * * the party's objection to the action of the court and the grounds therefor" at the time the ruling or order of the court); Fed. R. Civ. P. 51(d)(2) (allowing consideration for "plain error" of unpreserved objections to jury instructions if error "affect[s] substantial rights").

[9] Petitioner also points (Pet. 10 n.28, 13 n.36) to two unpublished decisions addressing the issue in the Section 2255 context, but those decisions have limited or no precedential value in their own circuits. See *Armstrong* v. *United States*, 107 Fed. Appx. 522 (6th Cir. 2004); *Celikoski* v. *United States*, 21 Fed. Appx. 19 (1st Cir. 2001).

App. 16a-21a), the fact remains that the decision below is the only published court of appeals decision resolving the issue in the Section 2255 context.[10]

Moreover, this case is not squarely in conflict with either *Scott* or *Nardi*. Neither of the respondents in those cases appears to have affirmatively advanced a statute of limitations defense in the district court, even after the court raised the issue. See *Scott*, 286 F.3d at 925, 928 (noting that "[a]lthough Rule 15(a) allows for the possibility of amending a pleading to include a previously omitted affirmative defense, the mere possibility of amendment through Rule 15(a) does not cure respondent's actual failure to raise the defense"); *Nardi*, 354 F.3d at 1142 n.5 ("[E]ven after the court raised the timeliness issue, Respondent never asserted or otherwise adopted the defense as its own."). In contrast here, once the district court raised the potential statute of limitations issue, the United States affirmatively advocated dismissal on untimeliness grounds, thereby effectively moving to amend its answer.

iii. Review of the question presented at this point would be premature. Even considering the Section 2254 cases, only three circuits besides the Third Circuit have published decisions squarely addressing whether a district court has the authority, post-answer, to *sua sponte* raise a potential statute of limitations problem, and the Eleventh Circuit has done so only in short per curiam opinions. See *Day* v. *Crosby*, 391 F.3d 1192,

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[10] Petitioner asserts (Pet. 19) that this case presents the issue in the contexts of both Section 2254 and Section 2255, but the basis for that assertion is not clear. While it is true that the court of appeals reasoned the result should be the same in both contexts, petitioner sought relief solely under Section 2255, as did Mr. Otero, the movant whose case was consolidated with petitioner's in the court of appeals. See Pet. App. 4a.

1194-1195 (11th Cir. 2004) (per curiam), petition for cert. pending, No. 04-1324 (filed Mar. 30, 2005) (holding that "[a] concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA"); *Jackson*, 292 F.3d at 1349. In addition, the courts in *Scott* and *Nardi* did not have the benefit of the Third Circuit's thoughtful discussion of the liberal right to amend answers under the Federal Rules of Civil Procedure. See *Long*, 393 F.3d at 399-401.

As such, the issue would benefit from further ventilation in the circuits. That process might result in the elimination of the tension in the circuits that currently exists. But even if it did not, future opinions are likely to take into account the careful analysis of the court below in a way that helps to promote a fuller understanding of the issue.

2. Petitioner also claims (Pet. 20-22) that the court of appeals erred when it did not remand his case to the district court for an evidentiary hearing on the issue of equitable tolling. That claim does not warrant review. In the first place, petitioner alleges no conflict on this fact-bound issue. Second, the majority opinion in the court of appeals did not address this claim,[11]

[11] The en banc majority did not directly address petitioner's request, see Pet'r C.A. Reply Br. 10, that the court of appeals remand the case to the district court for fact-finding to determine whether equitable tolling was appropriate. The majority did, however, make it clear that a court has the inherent power *sua sponte* to address an intentional alteration of a court document that conceals the untimeliness of a Supreme Court filing, and that its inherent power "does not depend on the responding party's position." Pet. App. 31a. Given that the dissenting judges advocated remand for an evidentiary hearing on the equitable tolling issue, *id.* at 36a-39a, the fact that the majority did not order a remand suggests that it either endorsed *sub silentio* the district

and this Court does not normally grant review on issues not passed on by the court below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). And in any event, the district court correctly declined to equitably toll the statute of limitations. Even if it is assumed that the statute may be equitably tolled, see *Pace* v. *DiGuglielmo*, 125 S. Ct. 1807, 1814 n.8 (2005) (noting that the Court has "never squarely addressed the question"), and it further is assumed that the apparent alteration of the court of appeals' judgment entry was an error made in good faith, rather than a deliberate attempt to conceal the untimeliness of petitioner's previous petition for a writ of certiorari, it is well-settled that mistakes or miscalculations by a petitioner's counsel of applicable filing deadlines do not warrant equitable tolling. See, *e.g.*, *Steed* v. *Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney's miscalculation based on "interpretation of a novel legal issue" of habeas limitations period is not basis for equitable tolling); *Kreutzer* v. *Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (counsel's confusion about applicable statute of limitations does not warrant equitable tolling for filing of habeas petition), cert. denied, 534 U.S. 863 (2001); *Harris* v. *Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000) (same); *Taliani* v. *Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same).

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court's disposition of the equitable tolling issue, see *id.* at 59a-60a, or agreed with the government that the proffers on appeal relating to the equitable tolling claim were not properly in the record, see note 3, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-3

IN THE

Supreme Court of the United States

HERBERT L. BENDOLPH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In this case, the *en banc* Third Circuit thoroughly addressed on the merits the first issue presented in Mr. Bendolph's petition, and it expressly noted that it was siding against the Sixth and Ninth Circuits in a split among the courts of appeals.[1] The judgment over which Mr. Bendolph seeks review is that of an almost evenly divided *en banc* court of appeals and, so, this Court would have the benefit of thorough majority and dissenting opinions. The courts of appeals are split, and this case is the proper vehicle for resolving this important *habeas* issue.

A. Mr. Bendolph did not waive the first issue presented in his petition and, in any event, there is no impediment to this Court's review because the en banc *Third Circuit thoroughly considered the issue.*

The Government is mistaken in its assumption that Mr. Bendolph had an obligation to object to the

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[1] The Government devotes a significant portion of its opposition to an argument that the majority of the Third Circuit was correct. Mr. Bendolph's petition and the dissenting judges of the Third Circuit explained thoroughly why the majority was mistaken and, so, this reply will not repeat those points.

One point in the Government's argument warrants comment, however. The Government expounds at length on the text and potential effect of Rule 4 of the Rules Governing Section 2255 Proceedings, but the Government leaves out any mention of Rule 4(b)'s express language indicating that it applies only to "preliminary review" *before* the respondent files an answer – a situation in no way implicated in Mr. Bendolph's case or in those that form the circuit split. Even the Third Circuit's majority recognized that important distinction and did not rely on Rule 4 to decide Mr. Bendolph's case. *See* App. A at 24a n.15.

district court's *sua-sponte* invocation of the statute of limitations.[2] It is well-established that waiver principles should be applied flexibly. *See Singleton* v. *Wulff*.[3] This Court has made clear that issues unaddressed in the district courts may properly be considered on appeal when the legal landscape has changed between the time of the proceedings in the trial court and those on appeal. *See, e.g., Newport* v. *Fact Concerts, Inc.*[4]

In this case, at the time the district court *sua sponte* injected the limitations issue into Mr. Bendolph's case, the Third Circuit had not yet decided *Robinson* v. *Johnson*,[5] and, so, there was no authority in the Third Circuit for the proposition that the Government *could* waive the affirmative defense of the statute of limitations in the Antiterrorism and Effective Death Penalty Act (the "AEDPA"). The state of the law changed *after* the district court denied

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2 There is some irony in the Government's arguing that Mr. Bendolph, a *pro se* litigant at the relevant time, waived his right to object to the district court's stepping in to cure the Government's (counseled) waiver of the statute of limitations. As this Court has held, *pro se* filings are to be liberally construed. *See Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). The Government's opposition seems to take the view that its own failure to raise an affirmative defense should freely be corrected by the courts but that a *pro-se* litigant's purported failure properly to object to the district court's lending assistance to the Government should be subject to an exacting and technical (and ultimately incorrect) waiver analysis.

3 428 U.S. 106, 120-21 (1976).

4 453 U.S. 247, 256 (1981)

5 313 F.3d 128 (CA3 2002).

Mr. Bendolph's Section-2255 motion. He had no duty to object to the district court's action when the legal predicate to do so did not yet exist.[6]

Even if Mr. Bendolph had such a duty, it would not affect the propriety of this Court's granting review. This Court has found an issue waived and not properly the subject of review when it was *both* not raised below and not passed on by the court below. *See Adickes* v. *S.H. Kress & Co.*[7] More recently, the Court explained that

> [o]ur traditional rule. . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below. That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions.[8]

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[6] Moreover, as the Government candidly concedes, this Court has never held that the waiver/"plain-error" analysis on which the Government relies applies to Section-2255 cases. *See United States* v. *Frady*, 456 U.S. 152 (1982).

[7] 398 U.S. 144, 147, n.2 (1970).

[8] *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quotation omitted); *see also, Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 376-77 (1995) (quotation omitted, emphasis original) ("In fact, even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice permit[s] review of an issue not pressed so long as it has been passed upon . . . ."); *See also, Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (same).

With respect to the first issue presented in his petition, Mr. Bendolph pressed that issue on appeal, and the Third Circuit granted a certificate of appealability. After extensive briefing and oral argument, a three-judge panel of that court considered the issue. The *en banc* court then took up the issue, accepted additional briefing and oral argument and entered extensive majority and dissenting opinions. The Third Circuit *sub silentio* rejected the Government's waiver contention, and the full court provided what the Government itself refers to as a "thoughtful" discussion. The Government errs in suggesting that there is any impediment to this Court's review.[9]

B. The en banc *Third Circuit expressly made its holding applicable both to Section-2255 cases and Section-2254 cases, and Mr. Bendolph's case directly implicates the undeniable circuit split.*

While Mr. Bendolph presented a Section-2255 motion, the Third Circuit expressly treated the two provisions as interchangeable and made its holding applicable both to Section-2255 cases and Section-2254 cases ("In conclusion, we hold that, upon finding a potential AEDPA statute of limitations problem in a

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[9] *See Newport*, at 453 U.S. at 256 ("Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves.").

habeas case arising under 28 U.S.C. §§ 2254 or 2255, a court may act *sua sponte* at any point in the proceedings . . .").[10]

This Court reviews holdings, and the Third Circuit's holding was that district courts may *sua sponte* raise the statute of limitations *both* in Section-2255 cases *and* in Section-2254 cases. That holding is unquestionably in conflict with holdings of the Sixth and Ninth Circuits.[11] Both the majority and dissenting judges of the Third Circuit understood the *en banc* determination to be at odds with the decisions of those two other circuits.[12] There is, then, an existing circuit split that review of this case would resolve.

Moreover, there is every reason to believe that the Sixth and Ninth Circuits would apply their Section-2254 decisions to Section-2255 cases as the Third Circuit did here. In fact, the Sixth Circuit has

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[10] App. A at 34a-35a. Moreover, district courts in the Third Circuit have begun to rely on the holding in *Bendolph* to raise *sua sponte* the statute of limitations in Section-2254 cases. *See, e.g., Fogg* v. *Carroll*, No. 03-558-KAJ, 2005 U.S. Dist. LEXIS 18157 at *7 n.2 (D. Del. Aug. 26, 2005).

[11] *See, e.g., Scott* v. *Collins*, 286 F.3d 923 (CA6 2002), and *Nardi* v. *Stewart*, 354 F.3d 1134 (CA9 2004).

[12] *See* App. A at 16a and 25a (majority) and 41a (dissent) ("We are on the wrong side of the split between the circuits."). Moreover, the Third Circuit has already begun applying the holding of *Bendolph* to Section-2254 cases. *See, e.g., Knecht* v. *Shannon*, 132 Fed. Appx. 407 (CA3 2005).

already applied *Scott* in the Section-2255 context. *See Armstrong* v. *United States.*[13]

Thus, while the existing circuit conflict relates to Section-2254 cases, there is every reason to extrapolate that division to Section-2255 cases. This case, then, presents the Court with the opportunity to resolve not only the existing and entrenched Section-2254 split but also the inevitable Section-2255 split.

C. With respect to all material facts, this case is indistinguishable from those in which the Sixth and Ninth Circuits reached contrary legal conclusions.

The Government asserts in its opposition that this case is not squarely in conflict with *Scott* and *Nardi* because there is no indication in those cases that the respondents raised the statute of limitations after the district courts prompted them to do so.

The Government's proffered distinction misses the mark. The question presented is whether, when a *habeas* respondent files an answer to the petition (or motion) and fails to raise the AEDPA's statute of limitations, the district court may later cure that waiver. That occurred in this case. That also occurred in *Scott* and in *Nardi.* The fact that, after the district court prompted it to do so in this case, the Government simply signaled its agreement with the district court is immaterial to the propriety of what

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13 107 Fed. Appx. 522 (CA6 2004).

the district court had already done.[14] The waiver had already occurred. The Government's proffered point of distinction, therefore, is not material, meaningful or even valid.

D. The Sixth and Ninth Circuits have shown no inclination to retreat from their holdings, and there is no reason for the Court to speculate that they might.

The Government speculates that something about the Third Circuit's opinion in this case might convince the Sixth or the Ninth Circuits to retreat from their holdings in *Scott* and *Nardi*. The Government does not support its argument with anything more than conjecture. The Sixth Circuit decided *Scott* more than three years ago, and it has given no indication that it will modify that precedent. Just last month, the Sixth Circuit cited *Scott* with approval in *Banks* v. *Jackson*.[15] The Ninth Circuit decided *Nardi* nearly two years ago and, again, there is no suggestion in that court's opinions that it is likely to overrule *Nardi*.

Four courts of appeals have offered precedential decisions on the first issue Mr. Bendolph presents in his petition, and those courts of appeals are evenly divided on the proper legal conclusion.

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[14] Notably, the Government never sought leave to amend its answer.

[15] No. 03-1364, 2005 U.S. App. LEXIS 19077 at *4 (CA6 Aug. 31, 2005).

There is a well-entrenched division that this Court should resolve.

E. The second issue presented in Mr. Bendolph's petition poses a legal rather than a factual question.

The Government mistakenly casts the second issue in Mr. Bendolph's petition as "fact-bound." It is not.

Mr. Bendolph does not ask this Court to resolve any disputed facts (nor did he ask the Third Circuit to do so). He noted the undisputed fact that *someone* other than Mr. Bendolph altered a critical court document so that included an incorrect and misleading date that was necessary to Mr. Bendolph's proper calculation of the date by which his Section-2255 motion was due. Both the majority and dissenting judges on the Third Circuit acknowledged that plain fact (and the Government has never denied it).[16] The question, then, is whether that document alteration warrants an evidentiary hearing in the district court to discover how the document came to be "modified," what effect it had on Mr. Bendolph's effort to file timely his Section-2255 motion and whether equitable tolling might be appropriate under the facts as developed. The question of whether the existence of *undisputed* facts calls for a remand to the district court to develop fully the evidentiary record on a critical point is in no sense "fact-bound."

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16 *See* App. A at 6a-7a (majority) and 36a-37a (dissent).